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Federal Procedure, Validity of Rule 35a Requiring Plaintiff to Submit to a Physical Examination

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recognize substantial interests which were traditionally not property rights or to repudiate the property doctrine entirely.[12]

The injunction issued by the Kentucky court is really for the specific performance of the negative covenant not to molest. If the court had taken the view that it was granting specific performance of the contract and not an injunction to restrain a tort, it would have been unnecessary to find a property right. The existence of a property right is not a prerequisite to specific performance. It is enough that the remedy at law is inadequate and that specific performance will be practicable and the decree enforceable under the circumstances.[13]

In this case there is a good contract and a clear legal right to the defendant's performance thereunder.[14] If, however, the defendant breaches the contract, the plaintiff's remedy at law is, clearly inadequate; for money damages, guessed at by a jury, cannot be an adequate substitute for the plaintiff's right to visit her aged mother.

The wisdom and expediency of granting specific performance of the negative covenant here is questionable. While the question of impracticability is less likely to arise in the enforcement of a negative covenant,[15] still the court is dealing with intimate family relations where the decree is not likely to improve the relations between the parties, and where the interference of a court of equity is of doubtful desirability.[16] The problem of enforcing this decree, of determining when the defendant has not complied with the injunction and is in contempt, is no small matter for the court to have undertaken.

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FEDERAL PROCEDURE, VALIDITY OF RULE 35a REQUIRING PLAINTIFF TO SUBMIT TO A PHYSICAL EXAMINATION.

Plaintiff brought a negligence action in the District Court of Illinois to recover for personal injuries suffered in Indiana. Defendant's answer denied all the allegations and moved for an order requiring plaintiff to submit to a physical examination as provided by Federal Rule 35a. Plaintiff refused to obey the court's

[12] 14 A. L. R. 295.

[13] Supra note 2.

[14] The court makes the implication that it might have protected the plaintiff's "natural right" to visit her mother altho there had been no contract to fortify that right. This would be a protection of a relational interest. See Green, *Relational Interests,* (1934) 24 Ill. L. Rev. 460. The interest here, however, is personal in nature and not one of substance or property such as equity has traditionally protected. Pound, *Equitable Relief Against Defamation and Injuries to Personality,* (1916) 29 Harv. L. Rev. 640.

[15] Walsh, A Treatise on Equity (1930) 339.

[16] Moreland, *Injunctive Control of Family Relations* (1930) 18 Ky. L. J. 207, 217; Simpson, *Fifty Years of American Equity* (1936) 50 Harv. L. Rev. 171, 221; Note 27 Ill. L Rev. 440.

order and was punished under the provisions of Federal Rule 37b.[1] From this ruling plaintiff appealed, contending, among other things, that Rule 35a was invalid. Circuit Court of Appeals affirmed this judgment, and the Supreme Court of U.S. granted certiorari. Held —The promulgation of Rule 35a was within the scope of authority delegated by Congress to the Supreme Court by the Enabling Act of 1934 to prescribe rules of procedure for Federal District Courts. *Sibbach* v. *Wilson & Co., Inc.*, 61 Sup. Ct. 422 (1941).[2]

The Rules of Civil Procedure provide: "The Supreme Court of United States shall have power to prescribe by general rules for the district courts . . . the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall not take effect until they have been reported to Congress at beginning of regular session thereof and until after the close of such session."[3] These rules were drafted by the Advisory Committee, studied by Judiciary Committees of both houses, and went into effect in 1938. During committee meetings Rule 35a[4] was discussed at length with particular reference to *Union Pacific R. R. Co.* v. *Botsford*,[5] and the rule was allowed to stand.[6] The fact that Congress took no action would indicate that there was no transgression of legislative policy.

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[1] The case was reversed and remanded on ground that the district court erroneously punished the plaintiff by contempt for refusal to submit to a physical examination when, as provided by that section, one of other remedies should have been used. 48 Stat. 1064, 28 U.S.C.A. following sec 723c (Supp. 1940).

[2] For a stronger case in accord on same point see Beach v. Beach, 114 F. (2d) 479 (C.C.A. for Dist. of Col.) (1940).

[3] C. 651, 48 Stat. 1064, 28 U.S.C.A. sec. 723b, 723c (Supp. 1940).

[4] Rule 35a: "In an action in which the mental or physical condition of a party is in controversy, the court in which action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined, and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." 48 Stat. 1064, 28 U.S.C.A. following sec 723c (Supp. 1940).

[5] 141 U.S. 250 (1890) This case held that the court did not have the power to order the plaintiff to submit to the physical examination. In a decision approving the Botsford case, a physical examination was required because a New Jersey Statute existed: Camden and Suburban R. Co. v. Stetson, 177 U.S. 172 (1900). In the Botsford case the court used language which forms the basis for the dissent in this case: "No right is held more sacred or is more carefully guarded by the common law, than the right of every individual to the possession and control of his person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

[6] Hearings before the Committee on the Judiciary, House of Rep. 75th Congress, 3rd Session, pp 117, 141; Hearings before a Subcommittee on the Judiciary, U.S. Senate, 75th Congress, 3rd Session, pp 36, 37, 39, and 51.

Prior to the enactment of these new rules the federal district courts followed the Conformity[7] and Rules of Decision[8] Acts and came to entirely different decisions on the right of the defendant to demand that the plaintiff submit to a physical examination in personal injury actions. Much time was wasted determining the position of the individual state on the point.[9] Before the new federal rules were formulated the highest courts of twenty-five states, including Kentucky,[10] had decided that the trial court had inherent power to exercise its discretion in ordering the plaintiff who sought to recover for physical injuries caused by the defendant to submit to an examination by an impartial physician appointed by the court to determine the extent of his injuries.[11] In eight states there were statutes giving this power to the courts.[12] This recent trend now followed in a majority of the state courts can be explained in part by the fact that the number of personal injury actions in proportion to all suits filed has greatly increased. Thus, the possibility of fraudulent claims against prosperous defendants has also become greater.[13] Therefore, assuming that there is no historical precedent in allowing the examination of the plaintiff,[14]

[7] Conformity Act required federal district court to conform to the procedural rules of the individual state in which the court sat. R.S. sec. 914 (1872), 28 U.S.C.A. sec. 724 (1928).

[8] Rules of Decision Act ordered district courts to follow the law of the state in which the contract was made or injury incurred, with regard to matters of substantive law. R.S. sec 721 (1789), 28 U.S.C.A. sec 725 (1928).

[9] Cases holding that the court was without power to require physical examination of the plaintiff: Illinois Central R. Co. v. Griffin, 25 C.C.A. 413, 80 Fed 278 (1897); Ren v. American Drug Co., 2 Extra-Terr Gas, 492, 498 (1923); Howland v. Beck, 56 F. (2d) 35 (9th C.C.A. 1932); but there were cases in which the court ordered the plaintiff to submit because of the decision of a state court or a state statute: Camden & Suburban Railway Co. v. Stetson, 177 U.S. 172, 44 L.Ed. 721, 20 Sup. Ct. 617 (1900); Bailey v. Texas Co., 34 F. (2d) 829 (E. D. N.Y. 1929).

[10] Belt Electric Line Co. v. Allen, 102 Ky. 551, 44 S.W. 89, 90 (1898); Commonwealth Life Ins. Co. v. Brandon, 265 Ky. 434, 97 S.W. (2d) 3 (1936).

[11] Wigmore on Evidence (3rd ed. 1940) sec. 2220, n.13.

[12] (1940) 34 Ill. L. Rev. 104 (The rule was changed by the statute in all of these states but one, Washington).

[13] Mr. Wigmore says, "There is in this class of cases, the added consideration that corporal injuries are to-day notoriously a subject of frequent fraud and misrepresentation so that the privilege to withhould the exhibition of the alleged injury may amount in such cases to nothing less than a judicial license for fraud. The defendant is merely requesting the right of self defense, by a peaceful 'moliter manus imponere' to defend himself against fraud." Wigmore, Evidence (3rd ed. 1940) sec. 2220

[14] Frankfurter's dissent in principal case, page 428. But see (1938) 25 Va. L. Rev. 73; Wigmore, Evidence (3rd ed. 1940) sec 2220 to effect that though there was no order in respect to personal injury actions, there were five different types of civil actions in

there is, nevertheless, sound logic which will validate the rule.[15] After examining the procedural rules of the various states the Supreme Court decided that the rule followed by the majority of the states was the most adequate to bring before the jury the true evidence in issue in the simplest manner. Moreover, congressional inaction after the rules were reported to Congress would lead to the conclusion that Rule 35a was within the intent of the legislature.

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EFFECT OF MITCHELL vs. UNITED STATES ON THE DUTY OF THE COMMON CARRIER IN KENTUCKY TOWARD THE NEGRO PASSENGER

An Arkansas statute requires segregation of white and colored passengers and "equal but separate and sufficient accommodations." The demand for first class accommodations being practically negligible on the part of colored passengers, no separate first class facilities were provided for them. Instead, when a colored person applied for such accommodations he was given a drawing room for no additional charge. In Mitchell v. U.S.[1] the drawing rooms were all occupied and the plaintiff, a colored representative to the United States Congress, was required to occupy a second class car of marked inferiority in quality and comfort. On appeal from a decision of the Interstate Commerce Commission the Supreme Court held this to be a violation of the Fourteenth Amendment and "unjust discrimination" within the Interstate Commerce Act.[2]

Though a segregation statute that is intrastate in character has been permitted if its effect on interstate commerce is purely incidental[3] no state can impose upon interstate commerce standards of treatment for passengers,[4] this being reserved to federal authority. Since this is true, and the legislatures of certain areas have decided upon segregation as necessary, the carrier has been allowed to establish rules of segregation of its own. These have, in practice, no effect except in "Jim Crow" states, and are said to be reasonable if

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which the defendant could demand such a physical examination, which were closely related.

[15] "There is no reason for permitting the inspection and examination of property and chattels, and denying it with respect to the physical or mental condition of a party where that condition is in controversy. The law has not, and should not, create any immunity or sanctity of the human body from a reasonable search for truth in a judicial proceeding." Moore, Federal Practice Under the New Federal Rules (1938), (1940 Supp.) 2648, n. 2.

[1] 61 S. Ct. Rep. 873 (1941).

[2] 24 Stat. 380 (1887), 49 U.S.C.A. section 3 (1). In reference to this the court said there was no question of segregation, but only one of equality of treatment.

[3] South Cov. &.C. Ry. Co. v. Kentucky, 252 U.S. 399 (1919).

[4] Hall v. DeCuir, 95 U.S. 485 (1877).